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No. ___

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IN THE

Supreme Court of the United States

SAMMY KNOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a jury is instructed that a conspiracy conviction may be supported by any one of several distinct objects and the jury renders a general verdict, must the defendant be sentenced based on the object of the conspiracy that carries the lowest statutory maximum sentence?

2. If a sentencing court errs in failing to sentence a defendant based on the object of the conspiracy that carries the lowest statutory maximum sentence when the jury renders a general verdict, can the sentencing error be excused based on the harmless error doctrine?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. In affirming the denial of Petitioner's request for collateral review under § 2255, the Seventh Circuit created one split of authority and expanded a second split of authority. The Seventh Circuit created a split of authority on the question whether the defendant must be sentenced based on the object of the conspiracy with the lowest statutory maximum for a multiple object conspiracy when the jury returns a general verdict. The Seventh Circuit also expanded the split of authority as to whether this type of sentencing error can be excused based on the harmless error doctrine.

OPINION BELOW

The Seventh Circuit rejected Petitioner's claim for ineffective assistance of counsel because, in that court's view, in a multiple-object conspiracy this Court's precedent does not require imposing a sentence based on the object with the lowest statutory maximum. The opinion of the court of appeals below was published and is reported as *Knox v. United States*, 400 F.3d 519 (7th Cir. 2004). The decision is reprinted in the attached Appendix (App. 1a-7a.).[1]

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 9, 2005. This petition is filed within 90 days of that date. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

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1 The record on appeal consists of one volume from the district court proceedings, one supplemental volume from the district court proceedings, and the supplemental record containing the trial transcripts and sentencing transcript in the underlying criminal case.

INTRODUCTION

This Court's intervention is required in this case to resolve two splits of authority on important constitutional questions. Based on this Court's decision in *Edwards v. United States*, 523 U.S. 511 (1998), the Second, Fourth, Sixth, Ninth, and Eleventh Circuits recognize that when the jury returns a general verdict in a multiple-object conspiracy case, the defendant's sentence must be based on the object of the conspiracy with the lowest statutory maximum. Accordingly, these Circuits have found error when the defendant's sentence exceeds the lowest statutory maximum sentence for any of the individual objects of the conspiracy. On the other hand, the Seventh Circuit has held that this Court's decision in *Edwards* did not even address this issue but left unanswered the issue of "what issues, if any, must be presented to a jury to support a particular prison term." *Knox*, 400 F.3d at 522. Based on this incorrect reading of *Edwards*, the Seventh Circuit held that Petitioner's counsel did not perform deficiently in failing to raise this error.

There is a further split of authority as to whether the error in failing to base the sentence on the object with the lowest statutory maximum sentence may be excused under the harmless error doctrine. The Second, Fourth, Sixth, and Eleventh Circuits do not excuse this type of error under the harmless error doctrine. In contrast, the Seventh Circuit held that the error can be left uncorrected under a harmless error analysis if given the evidence, the court concludes that the jury "would have found beyond a reasonable doubt" the object of the conspiracy with the greater statutory maximum. *Id.* at 523.

STATEMENT OF THE CASE

At the time of Petitioner's trial, several Courts of Appeals had held that when a jury was instructed in the disjunctive and returned a general verdict on a multiple-object conspiracy count, it was not possible to determine the basis for the jury's verdict and, thus, the court could not impose a

sentence greater than what would be supported by the object of the conspiracy with the lowest statutory maximum sentence. The leading case at the time was the Second Circuit's decision in *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir. 1984). Four other circuits had agreed. *See United States v. Garcia*, 37 F.3d 1359, 1370 (9th Cir. 1994) ("If the conspiracy was only to violate section 843(b), it is a crime punishable by a maximum sentence of four years; however, if it was to violate section 841(a)(1), it is a crime punishable by a maximum sentence of 15 years. In the absence of a special verdict, there was no way for the sentencing judge to know which object was the necessary element to constitute the crime. Thus, the verdict does not justify a 15-year sentence."); *Newman v. United States*, 817 F.2d 635, 637 (10th Cir. 1987) ("When . . . a defendant is charged with a conspiracy involving both narcotic . . . and nonnarcotic . . . drugs and the jury returns only a general verdict, the sentencing court cannot know for certain whether the fifteen-year maximum sentence for the narcotics or only a five-year maximum sentence for the nonnarcotic drugs is authorized."); *United States v. Quicksey*, 525 F.2d 337, 341 (4th Cir. 1975) (withholding judgment until the government elected to resentence or retry the defendant on a count involving a multiple-object conspiracy because "in the absence of a special verdict, it is not possible to ascertain whether the jury intended to find the defendants guilty of conspiracy to violate the Travel Act or the Drug Act, or both Acts"). The Seventh Circuit had reached the opposite conclusion in *United States v. Edwards*, 105 F.3d 1179, 1180 (7th Cir. 1997), which rejected *Orozco-Prada*.

A week after the district court issued its original sentencing order and three weeks before it amended its sentencing order in Petitioner's case, this Court decided *Edwards v. United States*, 523 U.S. 511 (1998). Although the Court affirmed the result in *Edwards*, the Court also explained that:

> Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. USSG § 5G1.1. But, as the Government points out, the sentences imposed here were within the statutory limits applicable to a cocaine-only conspiracy, given the quantities of that drug attributed to each petitioner. Cf. *United States v. Orozca-Prada*, 732 F. 2d 1076, 1083–1084 (CA2 1984) (court may not sentence defendant under statutory penalties for cocaine conspiracy when jury may have found only marijuana conspiracy).

Id. at 515 (citations omitted).

The facts of Petitioner's case fall squarely within this paragraph from *Edwards*. At the Government's urging, the district court instructed Petitioner's jury that it could convict him of a conspiracy to distribute drugs if it found that he had conspired to distribute any one of several distinct drugs. The jury returned a general verdict convicting Petitioner of this conspiracy, but the general verdict did not specify which drug Petitioner conspired to distribute. Although the drugs had different statutory maximum sentences ranging from life to two years, the district court imposed a life sentence.

In his § 2255 petition, Petitioner argued to the district court that his counsel was ineffective for failing to raise this error at sentencing or on appeal. A defendant is deprived of the effective assistance of counsel when counsel performs deficiently and the deficient performance prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance was deficient. Even after this Court's decision in *Edwards*, Petitioner's counsel failed to

object to the sentence in the district court or to raise the issue on appeal. In light of *Edwards* and the general verdict in Petitioner's case, counsel should have argued that the statutory maximum sentence for Petitioner's conspiracy conviction must be based on the object with the lowest statutory maximum.

Counsel's deficient performance was prejudicial. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The failure to raise this sentencing error was undoubtedly prejudicial because if this sentencing error cannot be excused by harmless error analysis, the correction of this error would have reduced Petitioner's sentence from life to two years.

After the evidentiary hearing to determine whether counsel for Petitioner had performed deficiently, the district court held that counsel's performance was deficient for failing to raise this error but that Petitioner was not prejudiced by counsel's failure. (App. 12a, 16a.) The district court determined that harmless error analysis was applicable and that the error was harmless. (App. 16a.)

On appeal, the Government did not dispute that Petitioner's counsel performed deficiently. Instead, it argued that Petitioner was not prejudiced by his counsel's deficient performance.

The Seventh Circuit held that Petitioner's counsel did not perform deficiently and that Petitioner was not prejudiced. *Knox*, 400 F.3d at 521. Without citing any authority, the Seventh Circuit indicated that the test for deficient performance was whether Petitioner's counsel failed to raise a "sure winner." *Id.* That holding is contrary to this Court's teaching that "the proper standard for attorney performance is that of *reasonably* effective assistance." *Strickland*, 466 U.S. at 687 (emphasis added). A reasonably effective counsel does not limit herself to "sure winners." The Seventh Circuit also

held that Petitioner was not prejudiced because the sentencing error was excused as harmless. *Knox*, 400 F.3d at 523.

REASONS FOR GRANTING THE WRIT

I. There is a conflict among the Circuits as to whether this Court in *Edwards* approved the rule identified by the Second Circuit in *Orozco-Prada*.

In its interpretation of *Edwards*, the Seventh Circuit in this case created a split of authority implicating the right to trial by jury. As discussed below, the Second, Fourth, Sixth, Ninth, and Eleventh Circuits recognize that in approving *Orozco-Prada* in *Edwards*, this Court indicated that when a jury is instructed that a conspiracy conviction may be supported by any one of several distinct objects and the jury renders a general verdict, the object with the lowest statutory maximum must be used to determine the statutory maximum sentence. On the other hand, the Seventh Circuit maintains that *Edwards* did not resolve this issue. This Court's intervention is necessary to resolve the conflict and restore uniformity with respect to the constitutional principles implicated here.

A. Five Circuits recognize that in *Edwards*, this Court approved the reasoning of *Orozco-Prada*.

In *Orozco-Prada*, the Second Circuit held that when, as in this case, the jury returns a general verdict with respect to a multiple-object conspiracy, the sentencing court must assume that the jury convicted based on the object with the lowest statutory maximum sentence. 732 F.2d 1076, 1083-84 (2d Cir. 1984). In *Orozco-Prada*, the defendant was charged with a conspiracy to violate either of two statutory provisions with different statutory maximum sentences. *Id.* at 1083. The jury returned a general verdict, and the sentencing court assumed that the defendant was convicted based on the object with the greater statutory maximum sentence. *Id.* The Second Circuit reversed for resentencing because without a

special verdict it was not possible to determine which object of the conspiracy supported the jury's verdict. *Id.*

In *Edwards*, this Court approved the principle of *Orozco-Prada* that the object of the conspiracy with the lowest statutory maximum must be used to determine the statutory maximum sentence for a conspiracy when a jury is instructed that a conspiracy conviction may be supported by any one of several distinct objects and the jury renders a general verdict. The defendants' jury in *Edwards* was instructed that it could convict them of a conspiracy to distribute cocaine or cocaine base. *Id.* at 513. The jury returned a general verdict, and under the Sentencing Guidelines the district court sentenced based on its finding that the defendants had conspired to distribute both drugs. *Id.* The Court approved the sentence under the Guidelines but noted that "Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy." *Id.* at 515 (citing *Orozco-Prada*).

As the Second, Fourth, Sixth, Ninth, and Eleventh Circuits have recognized, this language from *Edwards* approved the reasoning of *Orozco-Prada*. Interpreting *Edwards*, the Second Circuit explained that:

> Thus, the Supreme Court, citing with approval *Orozco-Prada*, recognized the critical distinction that where a sentencing court makes its own factual findings regarding the drugs that are the objects of a conspiracy, it may not impose a sentence, based on those findings, that exceeds the statutory maximum sentence permissible for the other drug that is the object of the conspiracy. It is this distinction that guides our holding here.

United States v. Zillgitt, 286 F.3d 128, 135-36 (2d Cir. 2002) (citing *Edwards*).

The Sixth, Ninth, and Eleventh Circuits similarly understand that *Edwards* approved the reasoning of *Orozco-Prada*. For example, in *United States v. Dale*, 178 F.3d 429 (6th Cir. 1999), the Sixth Circuit explained that: "Five courts of appeals have held that when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if he distributed only the drug carrying the lower penalty." *Id.* at 432. The Sixth Circuit then looked to this Court's decision in *Edwards* to determine whether these holdings were correct:

> In *Edwards* the sentences imposed were within the statutory limits applicable to a cocaine-only conspiracy, so the "difference" referred to by the Court was not relevant to the case. The implication here, however, is that the shorter maximum sentence should be used if the verdict is merely general, rather than specific, and the one drug allows for a sentence above the maximum for another charged drug. This implication is strengthened by the Court's approving reference to [*Orozco-Prada*], which held that following a general jury verdict on a conspiracy to distribute both cocaine and marijuana, a court may not sentence a defendant under the statutory penalties for cocaine conspiracy, as the jury may have found only a marijuana conspiracy.

Id. at 433; *see also United States v. Jackson*, 167 F.3d 1280, 1284 (9th Cir. 1999) (citing *Edwards* for the "holding that U.S.S.G. § 1B1.3 . . . was not unconstitutional, in part, because harsher suggested sentence imposed did not exceed statutory maximum of lesser object offense"); *United States v. Allen*, 302 F.3d 1260, 1270 (11th Cir. 2002) (quoting and describing *Edwards* as "relying in part on *Orozca-Prada*, 732 F.2d at 1083-1084, for the proposition that a court may not sentence a defendant under statutory penalties for a cocaine

conspiracy where the jury may have found only a marijuana conspiracy.").[2]

The Fourth Circuit has been quite explicit in its recognition of the *Edwards* Court's approval of *Orozco-Prada*. It explained that *Edwards* not only approved of *Orozco-Prada* but adopted it as this Court's "mandate." *United States v. Rhynes*, 206 F.3d 349, 381 (4th Cir. 1999), *rev'd in part on other grounds*, 218 F.3d 310 (4th Cir. 2000). The Fourth Circuit stated:

> The facts of the current case fall squarely within the ambit of *Quicksey* and *Edwards*. Here, the district court properly instructed the jury that it could find a defendant guilty on Count I if the jury determined that such defendant had conspired "to distribute or possess with intent to distribute heroin, or cocaine, or cocaine base, or marijuana." The jury then returned a general verdict finding all defendants guilty of Count I. The Government did not request a special verdict form, as was its obligation. With these general verdicts, it is thus impossible to determine on which statutory object or objects—sale of heroin, cocaine, cocaine base, or marijuana—the conspiracy conviction was based.
>
> Accordingly, as they must be applied here, *Quicksey* and *Edwards* prohibited the district court from imposing a sentence in excess of the statutory maximum for the least-punished object

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[2] *But see Black v. United States*, 373 F.3d 1140, 1146 (11th Cir. 2004) (describing the *Orozco-Prada* citation in *Edwards* as "not yet a certain holding" in 1998).

> on which the conspiracy conviction could have been based.

Id. at 380 (citations omitted) (referring to *United States v. Quicksey*, 525 F.2d 337 (4th Cir. 1975)).

The Fifth Circuit also follows the *Orozco-Prada* principle approved in *Edwards*, though without citation to *Edwards* or *Orozco-Prada*. In *United States v. Conley*, 349 F.3d 837 (5th Cir. 2003), the defendant was convicted of a conspiracy involving either the general conspiracy statute for mail fraud and money laundering or a specific money laundering conspiracy statute. *Id.* at 839. The Fifth Circuit rejected the Government's argument that the specific money laundering statute with its greater statutory maximum applied:

> [T]his Court's precedent dictates that, where a jury verdict is ambiguous, a sentence imposed for a conviction on a count charging violations of multiple statutes or provisions of statutes may not exceed the lowest of the potentially applicable maximums, which in this case is 60 months. *United States v. Cooper*, 966 F.2d 936, 940 (5th Cir. 1992). Here the jury rendered a general guilty verdict and did not specify the statutory violation. Conley cannot therefore be subject to the higher maximum penalty.

Id. at 840 (footnote omitted).

B. The Seventh Circuit's decision in this case created a split with five other Circuits regarding the scope of *Edwards*.

Despite authority directly to the contrary in five other Circuits, the Seventh Circuit held that *Edwards* left unanswered the question of "what issues, if any, must be presented to a jury to support a particular prison term in a prosecution under 21 U.S.C. § 841." *Knox*, 400 F.3d at 522. According to the Seventh Circuit, this Court's recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005), reiterated that the

Edwards Court left this question open. *Id.* (citing *Booker*, 125 S. Ct. at 754).

Yet nowhere in *Booker* did this Court address the question of general verdicts or multiple-object conspiracies. Rather, the Court noted that *Edwards* had "recognized that the defendants' statutory and constitutional claims might have had merit if it had been possible to argue that their crack-related activities were not part of the same conspiracy as their cocaine activities." 125 S. Ct. at 754. The Court expressly indicated that its prior decisions were not inconsistent with its holding in *Booker* that "the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines." *Id.* at 746. Thus, *Booker* simply did not address the appropriate maximum sentence when the jury returns a general verdict in a multiple-object conspiracy.

The conflict between the Seventh Circuit and the other five Circuits to have addressed this issue, moreover, is a mature one that is unlikely to be resolved without this Court's intervention. As explained earlier, the Seventh Circuit took the same position prior to *Edwards*, and has refused to change course in light of that decision. Conversely, the other Circuits to address this issue before and after *Edwards* have adhered to their prior positions as well. Only this Court can resolve the entrenched conflict on this important question of law.

II. There is a further split of authority as to whether this error can be excused based on the harmless error doctrine.

In holding this error harmless, the Seventh Circuit in this case expanded the split of authority on the important constitutional issue of whether this type of error can be excused based on the harmless error doctrine. The Second, Fourth, Sixth, and Eleventh Circuits have refused to excuse this type of error regardless of whether it has been forfeited by failing to raise it in the district court. On the other hand, the Seventh Circuit held that the error is harmless and can be excused if the reviewing court determines that the evidence would have

supported a guilty verdict on the object with the greater statutory maximum. *Knox*, 400 F.3d at 523.

Errors that "deprive defendants of 'basic protections'" are not subject to harmless error analysis, *Neder v. United States*, 527 U.S. 1, 8 (1999), because these errors are structural. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). A structural error is a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. Structural errors include errors that vitiate the jury's finding. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

The Eleventh Circuit views this type of error as one that must always be corrected because it is not subject to harmless error analysis. *United States v. Allen*, 302 F.3d 1260, 1276 (11th Cir. 2002). In other words, this type of error is a structural error. The court explained that:

> The recognized remedy for a *Dale-Rhynes* [*Orozco-Prada*] violation excludes any consideration of a harmless error review. Such a review questions whether a conviction should, despite error during the trial, be affirmed. In this case we do not set aside the convictions of the Defendants, but rather vacate the sentences and remand for re-sentencing . . . .

Id. As the Eleventh Circuit suggested, this error involves the proper application of the law, and thus, these types of errors are not subject to harmless error analysis.

Even if the error has been forfeited by failing to raise it in the district court, the Second, Fourth, and Sixth Circuits do not excuse this error. Instead, these Circuits correct this error under a plain error analysis. *Zillgitt*, 286 F.3d at 138; *Rhynes*, 206 F.3d at 379; *Dale*, 178 F.3d at 432.[3]

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[3] When an error is not raised in the district court, it is considered forfeited and may only be corrected if it is a plain error.

In *Zillgitt*, the Second Circuit determined that the error should not be excused as it affected the defendant's substantial rights. 286 F.3d at 138-41. Significantly, the court reasoned that it should not weigh the evidence as to whether the defendant was guilty of a conspiracy involving the object with the greater statutory maximum sentence. *Id.* at 139. It noted that:

> [W]hile the evidence proffered may also support a conviction for a cocaine conspiracy, we cannot tell, in the absence of a special verdict, whether the jury ever made that determination. In other words, the general verdict leaves open the possibility that the jury may have convicted Zillgitt on the basis of the evidence supporting a marijuana conspiracy without ever reaching a conclusion as to, or perhaps even considering, his involvement in a cocaine-only or a cocaine and marijuana conspiracy.

Id. at 140. The Second Circuit's reasoning suggests that when a jury returns a general verdict in a multiple-object conspiracy and it is possible that the jury convicted on the basis of only one of the objects, a sentence greater than the object with the lowest statutory maximum will always warrant correction by resentencing and can never be excused by the harmless error doctrine.

The Fourth and Sixth Circuits in *Dale* and *Rhynes* reached similar conclusions based on their plain error analysis indicating that this error cannot be excused by the harmless error doctrine. After reviewing the law including *Edwards*, the Fourth Circuit ordered that the error be corrected. *Rhynes*, 196 F.3d at 239-40. In *Dale*, the Sixth Circuit explained that it was correcting the error "because the use of the general verdict procedure was plain error." *Dale*, 178 F.3d at 433. Significantly, neither of these courts suggested that it was appropriate

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See FED. R. CRIM. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731 (1993).

to excuse the error if the jury might have found that the defendants conspired as to the object with the greater statutory maximum. Thus, these courts also concluded that the error in these cases warranted correction and suggested that this type of error will always warrant correction.

Unlike the Second, Fourth, Sixth, and Eleventh Circuits, the Seventh Circuit determined that the type of error in this case can be excused under the harmless error doctrine. *Knox*, 400 F.3d at 523. The court explained that this type of error is the same as a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* According to the Seventh Circuit, because *Apprendi* errors are harmless when there is overwhelming evidence, the error in this case can also be harmless. *Id.* It then concluded that as it had previously found the *Apprendi* violation in this case harmless, this error was also harmless. *Id.*

Contrary to the Seventh Circuit's conclusion, there is a fundamental difference between an *Apprendi* error and an *Orozco-Prada* error. *Compare Allen*, 302 F.3d at 1276 ("The recognized remedy for a *Dale-Rhynes* [*Orozco-Prada*] violation excludes any consideration of a harmless error review.") *with id.* ("[W]here an *Apprendi* violation exists, . . . a reviewing court must engage in a harmless error analysis."). *Apprendi* answered the question of *who* is the proper finder of fact with authority to increase the statutory maximum. *Apprendi*, 530 U.S. at 490. The question in this case, in *Orozco-Prada*, and in other cases cited above is: must the defendant's sentence be based on the object of the conspiracy with the lowest statutory maximum sentence when a jury is instructed that a conspiracy conviction may be supported by any one of several distinct objects and it renders a general verdict? In other words, the question here concerns how to interpret a jury's general verdict.

This case presents the Court with the opportunity to resolve two important constitutional questions that have divided the Circuits and caused a tremendous disparity in

sentencing for multiple-object conspiracies. Like the conflict over whether the defendant must be sentenced based on the object of the conspiracy that carries the lowest statutory maximum sentence, the conflict over whether this sentencing error can be excused based on the harmless error doctrine is both mature and entrenched. Only this Court can resolve these conflicts involving fundamental constitutional issues. Ultimately, Petitioner received ineffective assistance of counsel because, he received a life sentence for a "drug conspiracy" that would have been capped at two years if the case had arisen in most other Circuits.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 04-1938

SAMMY KNOX,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division.
No. 02 C 7392 (89 CR 908)—Matthew F. Kennelly, Judge.

ARGUED JANUARY 18, 2005—
DECIDED MARCH 9, 2005

Before POSNER, EASTERBROOK, and ROVNER, Circuit Judges.

EASTERBROOK, Circuit Judge. Sammy Knox is serving a life sentence for racketeering. The predicate felonies include drug offenses. He was a leader of the El Rukn street gang, which among its other unlawful activities distributed large quantities of cocaine and heroin until a series of prosecutions decapitated the organization. Knox's initial convictions and life sentence were vacated because of prosecutorial misconduct, see *United States v. Boyd*, 55 F.3d 239

(7th Cir.1995), but the result of the second trial was the same, and we rejected all of the 20 arguments presented on the gang leaders' appeals. See *United States v. Boyd*, 208 F.3d 638 (7th Cir. 2000). Three months after our decision, the Supreme Court released *Apprendi v. New Jersey*, 530 U.S.466 (2000), and it directed us to reconsider in light of that decision. 531 U.S. 1135 (2001). The jury that convicted Knox had not determined beyond a reasonable doubt either which drug (or drugs) the gang distributed, or in what quantity; until *Apprendi* those had been issues for the judge to resolve on the preponderance standard. See *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997), affirmed, 523U.S. 511 (1998). We concluded, however, that a new trial was unnecessary

> because the evidence shows beyond any possible doubt that the defendants, whose vast drug conspiracy is detailed in the opinion that the Court remanded, *United States v. Boyd*, 208 F.3d 638 (7thCir. 2000), were responsible for such a large quantity of drugs that had the jury been correctly instructed, it would have found them guilty beyond a reason-able doubt of the offenses for which they were sentenced.

United States v. Green, No. 98-2036 (7th Cir. Apr. 3, 2001)(unpublished order). The Supreme Court denied Knox's re-quest for certiorari. 534 U.S. 968 (2001). The prosecution, commenced in 1989 and growing out of events that date back to the 1960s, was over.

Before long, however, Knox was back in court seeking collateral relief under 28 U.S.C. §2255. He contended that his lawyer had rendered constitutionally deficient assistance by omitting a 21st issue on the second appeal: a claim that Knox calls "*Orozco-Prada* error" after *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir. 1984). The second circuit held in *Orozco-Prada* that, when a jury fails to determine which drug the defendants distributed, the judge must assume when imposing sentence that the drug was

whichever carries the lowest maximum penalty. For Knox that would be Talwin rather than marijuana, cocaine, or heroin, which the indictment also charged. (Talwin, a narcotic pain reliever, is a schedule IV controlled substance, and with Knox's criminal history the maximum penalty for its distribution would have been six years.) According to Knox, an "*Orozco-Prada* error" cannot be harmless, so his appellate lawyer's poor selection of issues necessarily is prejudicial. The district court was unpersuaded and denied the petition. *Knox v. United States*, 2004 U.S. Dist. LEXIS 4084 (N.D. Ill. Mar. 9, 2004). Knox's appeal places his case before us for the fourth time.

To obtain relief, Knox must establish not only that his lawyer furnished objectively deficient assistance—a quality so low that he was not acting as the "counsel" required by the sixth amendment—but also that this shortcoming caused prejudice. Knox cannot satisfy either requirement. He wants us to ignore everything his lawyer did for him and concentrate on one supposed failing. Yet courts assess the lawyer's work as a whole. *Strickland v. Washington*, 466 U.S. 668,690 (1984); *Holman v. Gilmore*, 126 F.3d 876, 881-84 (7th Cir. 1997). Knox's lawyer managed to get his first conviction annulled, despite the overwhelming evidence of guilt, and defended that victory against a determined appeal by the United States. The second trial was vigorously contested, as was the second appeal. Lawyers must curtail the number of issues they present, not only because briefs are limited in length but also because the more issues a brief presents the less attention each receives, and thin presentation may submerge or forfeit a point. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). Jones rejected a contention that the sixth amendment requires appellate counsel to raise all non-frivolous issues.

Raising 20 weak issues would not excuse omitting a sure winner, but that is not a plausible description of how Knox's lawyer proceeded. Our opinion in *Edwards*, which supplied the controlling law in this circuit when Knox's lawyer had to choose what issues to present, had rejected the holding of *Orozco-Prada*. We observed that *Orozco-Prada* predated the Sentencing Reform Act (which took effect in 1987) and that under the Sentencing Guidelines the judge alone deter-mines the kind and quantity of drugs. The Supreme Court affirmed *Edwards* in 1998. Reliance on the second circuit's1984 decision would not have been a wise appellate strategy on an appeal to this circuit argued (as Knox's was) in September 1999.

The Supreme Court had *Edwards* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), under advisement at the same time. The four Justices who dissented in *Almendarez-Torres* staked out a position that was to become the majority in *Apprendi* when one Justice changed sides. Edwards, by contrast, was unanimous—but the price of unanimity was ducking the question that so divided the Justices in *Almendarez-Torres* and *Apprendi*. Although *Edwards* held that the judge determines both the type and quantity of drugs under the Sentencing Guidelines, it ob-served that "the sentences imposed here were within the statutory limit applicable to a cocaine-only conspiracy" (523 U.S. at 515). At this point the Court dropped a "cf." citation to *Orozco-Prada*, which Knox says must mean that the Supreme Court endorsed its holding. But this is not what "cf." means, nor could it make sense to say that by affirming a decision that had rejected *Orozco-Prada*, the Supreme Court managed to adopt *Orozco-Prada* indirectly.

Instead of approving either *Orozco-Prada* or this circuit's contrary view, the Court in *Edwards* reserved judgment on what issues, if any, must be presented to a jury to support a particular prison term in a prosecution under 21 U.S.C.§841. *United States v. Booker*, 125 S. Ct. 738, 754 (2005), reiterates

that *Edwards* left this question open. In the wake of *Apprendi* this court held that drug type and quantity must be charged in the indictment and proved beyond a reasonable doubt to the extent that they raise the statutory maximum punishment beyond 20 or 40 years, the caps corresponding to particular quantities of drugs, but that juries need not resolve the precise amount for which the defendant is responsible. See *United States v. Nance*, 236 F.3d 820, 824-25 (7th Cir. 2000).

In retrospect, then, Knox's jury should have been told to determine whether he and his confederates agreed to distribute more than 5 kilograms of cocaine, or 50 grams of crack, or 1 kilogram of heroin, or 500 grams of methamphetamine, or any of the other kind-and-quantity combinations that make a person eligible for life imprisonment under §841(b)(1)(A). No more precision was necessary as of 2000(or today). *Nance* overruled decisions, including *Edwards*, that had allocated these factual determinations to the judge. (*Booker* in turn disapproved *Nance* and held that all factual matters that raise a mandatory guideline range must be established to the jury's satisfaction, and the Court implemented that rule by making the Sentencing Guidelines nonmandatory.) Had Knox's lawyer invoked *Orozco-Prada* in 1999, he would have lost under our decision in *Edwards* plus other pre-*Apprendi* decisions. See, e.g., *United States v. Jackson*, 207 F.3d 910 (7th Cir. 2000), remanded, 531U.S. 953 (2000), decision on remand, 236 F.3d 886 (2001).

What is more, even under *Nance* and other post-*Apprendi* decisions, a jury does not need to determine what other rugs the El Rukns distributed, once it finds that the gang handled 50 grams of crack, which would itself support life imprisonment for all of the leaders. See *United States v. Hoover*, 246 F.3d 1054, 1058 (7th Cir. 2001). A lawyer who concentrates attention on issues that have the best chance of success does not display objectively deficient performance, and thus does not render ineffective assistance of counsel. A failure to anticipate shifts in legal doctrine cannot be con-

demned as objectively deficient. See, e.g., *United States v. Smith*, 241 F.3d 546, 548 (7th Cir. 2001) (failure to anticipate *Apprendi* is not ineffective assistance).

For what little significance it has, we add that Knox did not suffer prejudice from his lawyer's omission. We held in 2001 that the *Apprendi* problem was harmless because any jury would have found beyond a reasonable doubt that the El Rukns distributed quantities of drugs that exposed the leaders to life in prison. Knox insists that an "*Orozco-Prada* error" differs fundamentally from an *Apprendi* error, but we do not see how. *Orozco-Prada* held that the kind of drugs isa jury issue; Apprendi and Booker hold that both kind and quantity are jury issues (if the answer sets the maximum lawful penalty). One is a subset of the other. Both *Apprendi* and *Orozco-Prada* could be rephrased, with equal plausibility, as holding that, if a jury does not make certain findings, then the judge cannot impose a sentence higher than the lowest statutory cap for any of the charged conduct. That's why we held in *United States v. Bjorkman*, 270 F.3d 482,490-92 (7th Cir. 2001), that *Apprendi* does not make drug type or quantity an "element" of the §841 offense: with-holding type or quantity from the jury reduces the maximum punishment but does not lead to an acquittal. See also *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001). Our harmless-error determination in 2001 covered both kind and quantity; it excludes any possibility that Knox is culpable for Talwin alone.

United States v. Cotton, 535 U.S. 625 (2002), holds that an *Apprendi* error does not require automatic reversal. In addition to *Cotton* see, e.g., *Neder v. United States*, 527 U.S. 1(1999); *Johnson v. United States*, 520 U.S. 461 (1997), which permit application of the harmless-error and plain-error standards when mistaken instructions fail to elicit the jury's decision on important questions. As the Court observed in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2525 (2004), juries are not necessarily more accurate than judges at finding facts. That's one reason why *Apprendi* and its successors do not ap-

ply retroactively on collateral attack. See *McReynolds v. United States*, ___ F.3d ___ (7th Cir. Feb. 2, 2005); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002). It is also why, as *Schriro*, *Neder*, and *Johnson* hold, judicial resolution of a factual dispute that should have been presented to a jury is not a "structural error" that requires automatic reversal. The district judge determined that Knox is responsible for distributing a quantity of cocaine that calls for a life sentence; we held in 2001 that allowing a judge rather than a jury to make this decision was a harmless error given the strength of the evidence; that decision also shows that Knox did not suffer prejudice for purposes of the right to counsel.

AFFIRMED

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:02-cv-07392
Other Court No: 89 CR-908-25

Title: USA v. Knox

Assigned Judge: Honorable Matthew F. Kennelly

MINUTE ORDER of 3/31/04 by Hon. Matthew F. Kennelly: Defendant Sammy Knox's motion for a certificate of appealability [33-1], is granted, in part, limited to the claim of ineffective assistance of counsel based on counsel's failure to raise the multiple-object conspiracy maximum-sentence issue (the *Orozco-Prada* issue). The motion is otherwise denied. Mailed notice.

This docket entry was made by the Clerk on April 5, 2004

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA	)	
	)	**Case No. 03 C 7392**
vs.	)	
	)	
SAMMY KNOX	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Sammy Knox was convicted, along with several other defendants, of narcotics conspiracy under 21 U.S.C. § 846 and racketeering conspiracy under 18 U.S.C. § 1962(d) and was sentenced to life in prison. His conviction and sentence were affirmed on appeal, and after the Supreme Court remanded the case to the Seventh Circuit for reconsideration in light of *Apprendi v. New Jersey*, 530U.S. 466 (2000), Knox's sentence was again reaffirmed.

Knox then filed a pro se motion in this Court under 28 U.S.C. § 2255 seeking to vacate his conviction and sentence. He raised six claims, several of which the Court dismissed after considering the government's response to the motion and Knox's reply. *See United States v. Knox*, No. 02 C7392, 2003 WL 22012680 (N.D. Ill. Aug. 26, 2003). The Court declined, however, to dismiss two claims and part of a third and ordered a hearing. The government moved to reconsider the Court's ruling, but we deferred ruling on that motion until after the evidentiary hearing. The government's motion and Knox's remaining claims are now ripe for decision.

We begin by revising briefly the remaining claims and their procedural history, to provide context for the matters under consideration. Each of the claims that remains is related to Knox's second claim. That claim is premised on the fact that the narcotics charge involved an allegation of a conspiracy to distribute multiple types of drugs, but the jury (with both sides' acquiescence) returned a general verdict of guilty. The claim is based on *United States v. Orozco-Prada*, 732 F.2d 1076 (2dCir. 1984), and its progeny in other circuits. Knox argues that because there was no way of knowing what particular type or types of drugs formed the basis for the conviction, it was improper to impose a sentence exceeding the maximum for conspiracy to distribute codeine syrup, the drug that carried the least severe maximum sentence of those alleged to have been part of the conspiracy. Knox argued in his third claim that a life sentence for racketeering conspiracy was improper because RICO permits a life sentence only if the penalty for one of the underlying racketeering acts is life in prison, which would not be the case if he were sentenced at the maximum for distributing codeine syrup. Knox's fifth claim (at least the part of it we did not dismiss) was also related to claim two: He argued that his trial and appellate counsel were ineffective for failing to argue the maximum-sentence issue involved in claims two and three.

In its response to Knox's petition, the government gave Knox's second claim the back of its hand. It made a two-paragraph argument which stated the following, without elaboration: at the time of Knox's sentencing, his maximum-sentence argument was foreclosed in this Circuit by *United States v. Edwards*, 105 F.3d 1179, 1180-81 (7th Cir. 1997); *Edwards* was affirmed by the Supreme Court in 1998, see *Edwards v. United States*, 523 U.S. 511 (1998); in any event Knox's maximum-sentence argument has been subsumed by *Apprendi*; and on remand of Knox's case, the Seventh Circuit found any *Apprendi* error harmless. *See* Gov't Resp. at 5-6. The government made no effort to develop these points in its response, and Knox effectively rebutted them in his reply,

pointing out that the Supreme Court's *Edwards* decision actually connoted approval of *Orozco-Prada*, and that his claim was logically distinct from the *Apprendi* claim that the Seventh Circuit had dealt with on remand.

As indicated earlier, the Court declined to dismiss Knox's maximum-sentence and related claims. We noted that several circuits (though not the Seventh) had adopted *Orozco-Prada* at the time of Knox's sentencing. *See Knox*, 2003 WL 22012680, at *3 (citing *Orozco-Prada*; *United States v.Garcia*, 37 F.2d 1359, 1369-71 (9th Cir. 1994); *United States v. Bounds*, 985 F.2d 188, 194-95(5th Cir. 1993); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir. 1990); *Newman v. United States*, 817 F.2d 635 (10th Cir. 1987)). And contrary to the government's argument, the Supreme Court's *Edwards* decision not only did not uphold the Seventh Circuit's contrary ruling, it appeared to reflect approval of *Orozco-Prada*, which the Court cited favorably in *Edwards*. *See Knox*, 2003 WL22012680, at *4 (citing *Edwards*, 523 U.S. at 515). Two circuits, in fact, had read *Edwards* as approving of *Orozco-Prada*. *Id.* (citing *United States v. Allen*, 302 F.3d 1260, 1269 (11th Cir.2002); *United States v. Zillgitt*, 286 F.3d 128, 135-36 (2d Cir. 2002)). And at least two circuits had held that *Orozco-Prada* maximum-sentence errors were not subject to harmless error review, in contrast to *Apprendi* errors. *Id.* at *5 (citing *Zillgitt*, 286 F.3d at 139-40; *Allen*, 302 F.3d at 1276,1277). We indicated that if harmless error analysis did not apply, then Knox "had a solid *Orozco-Prada* issue." *Id.*

Because Knox procedurally defaulted his maximum-sentence claims (claims two and three), he was required to show cause for the default and prejudice resulting from it before the Court can consider those claims on their merits. To establish cause for the default, Knox had to show that his counsel were ineffective in failing to raise the maximum-sentence claims. This was essentially the same showing needed to establish his stand-alone ineffective assistance

claim (claim five) based on counsel's failure to raise the maximum-sentence issue. The Court ordered a hearing on the issue of ineffective assistance and appointed counsel to represent Knox.

At the hearing, which took all of ten minutes, Knox's trial and appellate counsel testified that he had simply missed the maximum-sentence issue. Neither Knox's counsel nor the government contends that counsel's omission of the maximum-sentence issue had any strategic or tactical basis, or that counsel's failure to raise the issue was not ineffective assistance because the Seventh Circuit had rejected a similar claim in its own *Edwards* ruling. For the reasons discussed in our earlier ruling in this case, counsel's performance in this regard fell below constitutional minimums, leaving before us today only the question whether Knox was prejudiced as a result of the ineffective assistance. For the reasons indicated below, however, the Court is convinced that Knox's maximum-sentence claims are without merit and thus that he cannot show he was prejudiced by his lawyer's error.

After the Court set Knox's case for a hearing, the government came out of its fog, filing a motion to reconsider in which, for the first time in our estimation, it took Knox's maximum-sentence claims with the appropriate level of seriousness. It argued that the Court had erred in its analysis of the issue in several respects; it gave extended treatment to the question of whether harmless error analysis should apply; and it also argued, for the first time, that application of the rule of *Orozco-Prada* to Knox's case in the context of a § 2255 motion would violate *Teague v. Lane* 489 U.S. 288 (1989), which holds that a new rule of constitutional procedure[1] cannot be applied to convictions that were final at the time the new rule was announced. The government's

[1] The constitutional underpinning of *Orozco-Prada* is that an assumption that the jury found the defendant guilty of anything other than the least-serious object of a multiple object conspiracy violate the defendant's right to a jury trial.

Teague argument comes too late in the day. *Teague* is a non-jurisdictional rule that is subject to waiver by the government. *See Schiro v. Farley*, 510 U.S. 222, 229 (1994) (citing *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993)).

The government waived it here by failing to mention it in its answer to Knox's motion. Though a court may consider, or even raise on its own motion, a *Teague* issue that the government has waived, *see, e.g., Thomas v. Gilmore*, 144 F.3d 513,516 (7th Cir. 1998), we decline to do so in this case. First of all, the argument would not bar Knox's ineffective assistance claim in any event. Second, the government had ample opportunity to address Knox's claims in its response: it addressed the claims both on the merits and based on procedural default, but it did not mention *Teague* until after the Court had ruled that the maximum-sentence claims would not be dismissed. Were the Court to allow the government to raise the issue now, we would effectively be saying that the parties' briefs on a contested matter are merely a dry run, with a second go-round after they see what works and what does not work. Reconsideration is not the time to raise significant issues like the government's *Teague* argument. As the Seventh Circuit has stated, "[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.1987). The government's newly-minted *Teague* argument falls in neither category. And even were the Court to excuse the waiver, it is not clear that *Teague* would bar Knox's maximum-sentence claim, as what we consider to have been the Supreme Court's approval of *Orozco-Prada* in *Edwards* came while Knox's case was still pending on direct appeal. *See, e.g., Wright v. West*, 505 U.S. 277, 293(1992) ("new rules always have retroactive application to criminal cases pending on direct review," even though they do not apply retroactively to cases pending on collateral review); *Griffith v. Kentucky*, 479 U.S. 314, 320-328 (1987) (applying

rule of *Batson v. Alabama* to case pending on direct review when Batson was decided).

The Court likewise rejects the government's effort to torture out of the Seventh Circuit's decision in the direct appeal of one of Knox's co-defendants an indication that the Seventh Circuit still would reject *Orozco-Prada* even after the Supreme Court's *Edwards* decision. Adrian Bradd raised an *Orozco-Prada* issue in his appeal (Seventh Circuit Case No. 98-3840), but the Seventh Circuit rejected the argument without even mentioning it directly. See *United States v. Hoover*, 246 F.3d1054, 1062 (7th Cir. 2001) ("None of the other arguments concerning sentencing calls for are reduction."). The government would have us read this as a square rejection of *Orozco-Prada*. But as the government itself notes, "Bradd had forfeited the *Orozco-Prada/Edwards* issue in the district court." *See* Gov't Reconsideration Reply at 4. For that reason, the Seventh Circuit's rejection of the point in Bradd's appeal cannot sensibly be viewed as a ruling on the issue's merits.

The Court is persuaded, however, that it erred in stating that harmless error analysis does not apply to *Orozco-Prada* errors. As the government correctly points out,[22] the Supreme Court has held that most constitutional errors can be harmless; only those errors that are "structural," in the sense that they "affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself," subject a conviction to automatic reversal. *See Neder v. United States*, 521 U.S. 1, 8 (1999). Errors in the automatic-reversal category include the complete denial of counsel, the refusal of self-representation, the denial of a public trial, bias of the trial judge, and defects in how the jury is instructed on the fundamental concept of reasonable doubt.

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[2] Unlike the *Teague* argument, the government made the harmless error argument in its original response to Knox's § 2255 motion, though as noted earlier it did not develop the point.

See id. (citing cases). "Such errors infect the entire trial process, and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." *Id.* (citations and internal quotation marks omitted).

Upon further consideration, the Court does not believe that a violation of the rule of *Orozco-Prada* falls within this "limited class," *Neder*, 521 U.S. at 8, such that harmless error analysis does not apply. Though as indicated in our earlier ruling in this case there are logical distinctions between *Orozco-Prada* error and *Apprendi* error, there are similarities between the two that are instructive. An *Orozco-Prada* error occurs when the jury returns a general verdict of guilty on a conspiracy charge that involved multiple objects, making it impossible to say exactly what the jury decided. A judge who imposes, in that scenario, a sentence higher than the maximum for that applicable to the least-serious object of the conspiracy has made a potentially-unwarranted assumption about what the jury found. He has effectively intruded into the jury's decision making process and imposed his own interpretation of the outcome. An *Apprendi* error occurs when the judge, rather than the jury, decides a fact that increases the penalty for an offense beyond the prescribed statutory maximum. *Apprendi*, 530 U.S. at 490. When this occurs, the judge has effectively usurped a responsibility that the Constitution confers upon the jury.

In sum, though the issues posed by *Orozco-Prada* and *Apprendi* are logically distinct, both involve the proper allocation of responsibility to the jury, a core value in our criminal justice system. Given that context, the Court is hard pressed to say that an *Apprendi* error is any less "structural" than an error under *Orozco-Prada*. And yet *Apprendi* errors are subject to harmless error analysis (just as is the case when

the judge erroneously fails to instruct the jury on an element of the offense and thus effectively decides that issue himself, *see Neder*, 527 U.S. at 8-13). *See, e.g., United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2000). It follows that the same should be true of *Orozco-Prada* errors and would be true in this Circuit were the Seventh Circuit to follow *Orozco-Prada*. The Court therefore disagrees with those courts that have determined that *Orozco-Prada* is not subject to harmless error analysis.

Applying harmless error review, the Court must determine whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty [of conspiring to distribute a substance that carried a life term] absent the error." *Neder*, 527 U.S. at 18. This is, as the government argues, the exact point that the Seventh Circuit decided on remand in Knox's case. Specifically, the court found that "the evidence shows beyond any possible doubt that [Knox was] responsible for such a large quantity of drugs that had the jury been correctly instructed, it would have found [him] guilty beyond a reasonable doubt of the offenses for which [he was] sentenced," namely a conspiracy to distribute narcotics carrying a possible term of life in prison. *United States v. Green*, Nos. 98-2036,98-2037, 98-2038, 98-2060, 2001 WL 338109, at *1 (7th Cir. Apr. 3, 2001) (unpublished decision). For this reason, Knox has not shown the type of prejudice needed to establish his ineffective assistance claim – a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different, *Strickland v. Washington*, 466 U.S. 668, 694 (1984) – or to establish the cause-and-prejudice required to overcome the procedural default of his maximum-sentence claims.

Conclusion

For the reasons stated above, the Court grants the government's motion to reconsider [docket# 22-1] and dismisses all of Knox's remaining claims. The Clerk is

directed to enter judgment in favor of the United States. Knox's counsel are invited to submit a Criminal Justice Act appointment form and voucher, in the appropriate format, at their earliest convenience.

/s/
MATTHEW F. KENNELLY
United States District Judge

Date: March 9, 2004

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	**Case No. 02 C 7392**
	)	
SAMMY KNOX	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Sammy Knox, a member of the El Rukn street gang in Chicago, was indicted on federal drug conspiracy and racketeering charges in 1989. In 1991, he was tried before a jury and convicted. Because of prosecutorial misconduct, however, the trial judge ordered a new trial. Knox was tried and convicted a second time in 1996. Following the second jury's verdict, he was sentenced to life for narcotics conspiracy under 21 U.S.C. § 846 and racketeering conspiracy under 18 U.S.C. § 1962(d). His conviction and sentence were affirmed on appeal, but the United States Supreme Court granted Knox's petition for writ of certiorari and remanded the case to the Seventh Circuit for reconsideration in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On remand, Knox argued that his life sentences were unconstitutional under *Apprendi*, in that they were imposed based on facts (the types and quantities of drugs involved in the narcotics and racketeering conspiracies) that had not been found by a jury beyond a reasonable doubt. *See id.* at 490 ("Other than the fact of a prior conviction, any fact

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). But the Seventh Circuit decided that the evidence at trial showed "beyond any possible doubt" that Knox was responsible for a large enough quantity of drugs that, had it been properly instructed, the jury would have found him guilty beyond a reasonable doubt for the offenses for which he was sentenced. *See United States* v. *Green*, 6 Fed. Appx. 377 (7th Cir. 2001) (unpublished).

Knox has now filed a motion under 28 U.S.C. § 2255 seeking to vacate his conviction and sentence. In the motion, he raises six claims. Claim 1 is a double jeopardy claim. Knox argues that a charge of narcotics conspiracy under 21 U.S.C. § 846 is a lesser included offense in a charge of racketeering conspiracy under 18 U.S.C. § 1962(d). Consequently, he argues, his life sentence for narcotics conspiracy constitutes cumulative punishment in violation of the double jeopardy clause of the Fifth Amendment. Claim 2 concerns a sentencing-related error. Though he was charged with a multi-drug conspiracy, the jury returned a general verdict of guilty on that charge without making any finding as to the type and quantity of drugs involved in the conspiracy (a special verdict form was not used). Knox argues that the trial judge erred by imposing a sentence on the narcotics conspiracy conviction that exceeded the maximum penalty for the least serious drug offense for which the jury might have found Knox guilty. Claim 3 carries this same issue to the RICO conviction; a life sentence was available on the RICO charge only if it was based on a predicate criminal act that carried a possible life term. Because a life sentence was inappropriate for the narcotics conspiracy charge, Knox argues, it was *a fortiori* inappropriate for the RICO charge. Claim 4 involves the government's use of duplicate tape recordings as evidence at Knox's trial. Knox alleges that the tapes were tampered with and has requested to have them produced for expert examination. Claim 5 is based on

ineffective assistance of counsel. Specifically, Knox contends that his counsel rendered ineffective assistance by failing to raise and preserve three of the first four substantive issues raised in the instant motion (the general verdict and tape tampering claims) and by failing to provide adequate representation before the Seventh Circuit on remand from the Supreme Court Finally, in Claim 6, Knox asserts that his counsel rendered ineffective assistance during his trial by failing to call available witnesses who, he says, would have testified that he withdrew from the narcotics and racketeering conspiracies prior to legislative reforms that increased the maximum penalty for those offenses from 20 years to life.

DISCUSSION

To succeed on a § 2255 motion, a convicted defendant must show that he was sentenced in violation of the Constitution or laws of the United States or that the sentence exceeded the maximum sentence authorized by law or is otherwise subject to collateral attack. *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996). A § 2255 motion is not a substitute for direct appeal. *Id.* Claims raised in Knox's motion that were not raised on direct appeal are considered procedurally defaulted and cannot be reviewed unless he can show cause for the default and actual prejudice resulting from the failure to raise those claims. *Id.; United States v. Frady*, 456 U.S. 152, 170 (1982).

1. Claim 1 (double jeopardy)

In his first claim, Knox argues that imposition of a sentence for narcotics conspiracy in addition to a sentence for RICO conspiracy constitutes cumulative punishment that violates the double jeopardy clause of the Fifth Amendment. He contends that narcotics conspiracy under 21 U.S.C. § 846 is a lesser included offense of a RICO conspiracy charge predicated on narcotics conspiracy and that he therefore cannot be punished for both offenses. Though the Seventh Circuit has not addressed this issue, other Courts of Appeals have determined either that narcotics conspiracy (or any other

offense serving as a RICO predicate) is not a lesser included offense of RICO, *see United States v. Marino*, 277 F.3d 11,39 (pt Cir. 2002); *United States v. Thomas*, 757 F.2d 1359, 1371 (2od Cir. 1985), or that cumulative sentences may be imposed for violations of 21 U.S.C. § 846 and 18 U.S.C. § 1962(d) because that is what Congress intended. *See United States v. White*, 116 F.3d 903,931 (D.C. Cir. 1997) (explaining that if one crime is a lesser included offense of another, punishment still may be imposed for both if Congress intended cumulative punishment, and holding that Congress authorized cumulative punishments for drug conspiracy and RICO conspiracy); *see generally, Garret v. United States*, 471 US. 773, 779 (1985). Nevertheless, Knox argues that the Supreme Court's decision in *Rutledge v. United States*, 517 US. 292 (1996), in which it held that cumulative punishments could not be imposed for narcotics conspiracy under 21 U.S.C. § 846 and continuing criminal enterprise under 21 U.S.C. § 848, controls the issue. He insists that the "structure, history and scope" of RICO is "indistinguishable" from the continuing criminal enterprise statute and that a § 846 drug conspiracy charge is a lesser included offense of both. Knox Mem. at 6-7.

As Knox acknowledges, however, he failed to raise this argument on direct appeal. He does not claim "cause" for that default resulting from ineffective assistance of counsel. *See* Knox Mem. at II. Rather, his only argument for excusing the default is that *Rutledge* represented a change in substantive law, *see Robinson v. United States*, 196 F.3d 748, 752 (7th Cir. 1999), and should operate retroactively to correct his sentence. But there is no issue of retroactivity here; *Rutledge* was decided in 1996, before his October 1997 sentencing and the 1999 decision in his appeal. Knox makes no attempt to explain why he did not argue *Rutledge* at that time. He has failed to excuse the procedural default, and thus this Court cannot consider the double jeopardy claim on its merits.

2. Claims 2-4 (general verdict claims, Title III tapes/*Brady* claim)

With regard to claims 2, 3 and 4, Knox argues that his counsel was ineffective in failing to raise these issues and that this constitutes cause for failing to raise these claims at trial and on direct appeal. To excuse the procedural default, Knox must show that his attorney's failure to raise the claims amounted to constitutionally ineffective representation under the standard established in *Strickland v. Washington*, 466 U.S. 668, 687-700 (1984), and that he suffered actual prejudice as a result of his counsel's deficient performance. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Prewitt*, 83 F 3d at 816 (ineffective assistance of counsel constitutes "good cause" to overcome procedural default if attorney's representation was deficient and that performance "so prejudiced his defense that the resulting proceedings against him were fundamentally unfair and unreliable"). Knox has also asserted ineffective assistance as a separate claim (claim 5) based in part on his attorney's failure at trial to raise and preserve the claims raised in claims 2, 3 and 4. The analysis required to determine the merits of those aspects of claim 5 is the same analysis required to resolve the cause-and-prejudice question as to claims 2, 3 and 4. *See Prewitt*, 83 F.3d at 816-17.

a. Claim 2

Knox was charged and convicted of a conspiracy to distribute multiple drugs: heroin, cocaine, marijuana, amphetamines, codeine syrup, and Talwin and Triplenamine, commonly referred to as "T's and blues." The jury returned a general verdict; it was not asked to make specific findings regarding the type and quantity of drugs involved in the conspiracy. Knox contends that under the law, the trial judge was precluded from imposing a sentence for narcotics conspiracy greater than the two-year maximum that could have been imposed for a conspiracy to distribute what was, for sentencing purposes, the least serious drug involved in the charged conspiracy: codeine syrup, a Schedule V controlled

substance.

This rule was first adopted in multiple-drug conspiracy cases by the Second Circuit in *United States v. Orozco-Prada*, 732 F.2d 1076 (2nd Cir. 1984), and by the time of Knox's sentencing it had been accepted by at least four other Circuits. *United States v. Garcia*, 37 F.3d 1359, 1369-71 (9th Cir. 1994); *United States v. Bounds*, 985 F.2d 188, 194-95 (5th Cir. 1993); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir. 1990); *Newman v. United States*, 817 F.2d 635 (l0th Cir. 1987). The decision in *Orozco-Prada*, in which the defendant was convicted on a general verdict of conspiracy to distribute cocaine and marijuana, was based on the proposition that "in the absence of a special verdict, there was no way for [the trial judge] to know whether the jury intended to convict [the defendant] for a cocaine-related conspiracy, for a marijuana-related conspiracy, or for a conspiracy involving both drugs." *Orozco-Prada*, 732 F.2d at 1083. The general verdict thus caused a "problem of ascertaining juror intent," making it impossible to say that the jury had actually found that the defendant had participated in a conspiracy to distribute the drug as to which a more-serious sentence applied. *Id.* at 1084. The court therefore gave the government the option of consenting to a resentencing based upon the least-severe maximum sentence; if the government did not do so, a new trial would be required. *Id.* In *Newman*, the Tenth Circuit held that this issue was "plain error," reviewable on appeal even if not raised at trial. *Newman*, 817 F.2d at 637, n.3.

The same counsel represented Knox at trial and on appeal; counsel did not raise this issue in either forum. At the time of Knox's sentencing in October 1997[1], the Seventh Circuit was the one Circuit that had rejected *Orozco-Prada*. In *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997), a

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[1] Knox was sentenced in early October 1997, but the judgment was not entered until April 23, 1998.

case involving a charged conspiracy to distribute cocaine and "crack," the court reasoned that the Sentencing Guidelines allocated to the trial judge the determination of what drug and what quantity of that drug was distributed, and permitted the judge to consider as "relevant conduct" the distribution of other drugs as part of the course of conduct even if they were not identified in the indictment *Id.* at 1180. The court stated:

> Because sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal. What a jury believes about which drug the conspirators distributed therefore is not conclusive - and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options.

Id. at 1181.

On October 20, 1997, just after Knox's sentencing but six months before the judgment was entered, the Supreme Court granted *certiorari* in *Edwards* based on the split in the Circuits. The case was argued on February 23, 1998, and it was decided on April 28, 1998, five days after the judgment in Knox's case was entered and one day after he had filed a notice of appeal. *Edwards v. United States*, 523 U.S. 511 (1998). The Court held that even if one accepted the proposition that the sentence was limited that applicable to the least-serious narcotic for sentencing purposes, that made no difference in *Edwards*. The reason for this was the same relevant conduct rule cited by the Seventh Circuit:

> the sentencing judge here would have had to determine the total amount of drugs, determine whether the drugs consisted of cocaine, crack, or both, and determine the total amount of each - regardless of whether the judge believed that petitioners' crack-related conduct was part of

> the "offense of conviction," or the judge believed that it was "part of the same course of conduct or common scheme or plan." The Guidelines sentencing range - on either belief - is identical.

Id. at 514. Significantly, however, the Court went on to say that "[o]f course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy." *Id.* at 515. This was not so in *Edwards*, as the sentences imposed were within the statutory maximum for a cocaine-only conspiracy. *See id.*

The Supreme Court's comments, and its citation of *Orozco-Prada*, see *Edwards*, 523 U.S. at 515, appear to denote approval of the *Orozco-Prada* rule in cases like Knox's in which, unlike in *Edwards*, the sentence imposed in fact exceeded the statutory maximum for the lowest-level narcotic charged in the indictment. That is, in fact, the way that *Edwards* has been read in the Circuits. *See, e.g., United States v. Allen*, 302 F.3d 1260, 1269 (11th Cir. 2002); *United States v. Zillgitt*, 286 F.3d 128, 135-36 (2nd Cir. 2002). As best as we can tell, the Seventh Circuit has not been called upon to address the point since *Edwards*.

The government's response to Knox's § 2255 motion does not address *Orozco-Prada* head on. Rather, the government views *Orozco-Prada* as an obsolete vestige of pre-*Apprendi* sentencing law. It takes the position that *Apprendi*, in which the Supreme Court held that any fact that increases the maximum statutory penalty for an offense must be submitted to a jury and determined beyond a reasonable doubt, trumps the *Orozco-Prada* rule. Taking this one step further, the government contends that the Seventh Circuit's finding on remand in this case that any *Apprendi* error was harmless "beyond any possible doubt" also applies to the alleged *Orozco-Prada* error in this case. *See* Govt. Response

at 6.

The government's argument is not entirely convincing. It is true that both *Orozco-Prada* and *Apprendi* have to do with the allocation of responsibility between judges and juries. *Apprendi*, as we have noted, says that a fact that increases the maximum penalty must be submitted to a jury and determined beyond a reasonable doubt. *Orozco-Prada*, which applies only in multiple-object conspiracy cases, says, in effect, that a sentencing court must assume that the jury found that the conspiracy involved the least-serious narcotic unless the jury made a specific finding indicating otherwise. Both types of errors can be avoided by requiring the jury to make findings about what, and what quantity, of drugs are involved in a particular conspiracy. But the way in which reviewing courts consider *Apprendi* violations arguably differs from the way they view *Orozco-Prada* violations. In the Seventh Circuit, *Apprendi* violations are subject to harmless error analysis, as reflected by that court's decision in this very case: the reviewing court will examine the record and determine on its own whether a properly instructed jury would have found the defendant guilty even if properly instructed. *See, e.g., United States v. Trennell*, 290 F.3d 881, 890 (7th Cir. 2002). By contrast, it does not appear that *Orozco-Prada* violations are subject to harmless error analysis. *See, e.g., Zillgitt*, 286 F.3d at 139-40. This is so, it appears, even in Circuits that apply harmless error analysis to *Apprendi* errors. *See Allen*, 302 F.3d at 1276 ("The recognized remedy for [an *Orozco-Prada*] violation excludes any consideration of a harmless error review."); *id.* at 1277 (subjecting an *Apprendi* error in the same case to harmless error analysis). If this is correct, then the Seventh Circuit's ruling that the *Apprendi* error in this case was harmless does not necessarily foreclose consideration of the *Orozco-Prada* issue.

If harmless error analysis does not apply to *Orozco-Prada* violations, then Knox had a solid *Orozco-Prada* issue

in this case. He received a life sentence, whereas the maximum sentence applicable to a conspiracy to distribute codeine syrup is two years. And Knox likewise has a good argument for excusing his default of the issue, namely, that his lawyer was ineffective in failing to raise the point at sentencing, or at least on appeal. At the time of sentencing, even though the Seventh Circuit had decided the point adversely in *Edwards*, there was a split in the Circuits, and thus a reasonably competent attorney arguably should have raised the issue despite *Edwards*. Though we acknowledge the government's point that "'[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law,'" *Valenzuela v. United States*, 261 F.3d 694, 700 (7th Cir. 2001) (*Apprendi* issue) (quoting *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993))), that proposition would not appear to be dispositive in Knox's case. A finding that counsel should have raised the *Orozco-Prada* issue at the time of sentencing would not be the same as requiring him to "forecast" a change in the law; rather it would require only that counsel act to preserve a point that was the subject of a clearly-defined Circuit split. Indeed, the Seventh Circuit has indicated that "a responsible lawyer" ought to have preserved the point later covered in *Apprendi* by raising it in the trial court even before *Apprendi* was decided, and despite adverse precedent in this Circuit. *See United States v. Nance*, 236 F.3d 820,824 (7th Cir. 2000). Arguably the same is true of Knox's trial counsel. And even if counsel's failure to raise the issue at trial can be excused, by the time of Knox's appeal, no change in the law was required to raise the *Orozco-Prada* error (due to the intervening *Edwards* decision), and counsel likely could have argued the issue as plain error even though he had not raised it at sentencing. *See Zillgitt,* 286 F.3d at 138-41 (addressing Orozco-Prada violation as plain error and announcing intention to vacate sentence).

All of this indicates that Knox may have a meritorious claim that the procedural default resulting from his failure to

raise *Orozco-Prada* at sentencing should be excused due to the ineffective assistance of counsel, and/or a meritorious stand-alone claim of ineffective assistance arising from that same failure. At this point we know nothing of why Knox's counsel (as we have noted, the same attorney at sentencing and on appeal) did not raise the issue, or even whether he considered raising it. A hearing is required on a section 2255 motion when the movant asserts properly-supported facts that, if proven, would entitle him to relief. *Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001); *see also, Rodriguez v. United States*, 286 F.3d 972, 986 (7th Cir. 2002) (hearing is required on section 2255 motion "when factual disputes exist" that cannot be determined on the paper record before the Court). Such is the case here.

b. Claim 3

Claim 3 involves a challenge to Knox's life sentence for RICO conspiracy. The statutory maximum sentence for RICO conspiracy is ordinarily 20 years; a life sentence may be imposed only if the penalty for one of the underlying racketeering acts is life. 18 U.S.C. § 1963. This claim depends entirely on the merits of claim two, the *Orozco-Prada* issue that we have just discussed. If Knox prevails on that claim, he will likewise prevail on claim 3. For this reason, the hearing that the Court has ordered will also cover this claim and the corresponding ineffective assistance claim.

c. Claim 4

Claim 4 concerns Knox's contention that the government used falsified copies of taped conversation as evidence against him at trial. Seeking to invoke the rules of discovery for § 2255 cases, he has requested that the government produce for expert analysis the original sealed copies of the tape recorded conversations and the duplicate recordings that were used against him at trial. Knox treats this claim as a new issue; in fact he "concedes" it has been procedurally defaulted and offers his counsel's ineffective assistance as cause for default. But default is not an issue, as

Knox raised this claim both at trial and on appeal, and the possibility of government tampering with the tapes was explored and rejected by both the district court and the Seventh Circuit. Because the issue was raised, there is no need to excuse a "default," and no basis for a claim of ineffective assistance of counsel arising from the purported failure to raise the issue.[2]

The facts relating to the history of the tapes recordings used against Knox during trial are recounted in Seventh Circuit's appeal in this case. *See United States v. Boyd*, 208 F.3d 638,642 644 (7th Cir. 2000). We will summarize them briefly. During Knox's second trial, the government introduced into evidence copies of recorded conversations.[3] Knox and his co-defendants contested the tapes' authenticity. Though an expert examination revealed a discrepancy between one of the original recordings and its duplicate original, the trial judge admitted the tapes into evidence and allowed them to be played to the jury. *Id.* at 644. On appeal, the Seventh Circuit affirmed the trial judge's decision to admit the tapes. It emphasized that the expert who examined the tapes at trial could not determine the cause of the discrepancy, acknowledging that it "could have been a malfunction or could have been a bit of creative editing." *Id.* But the Court of Appeals agreed with the trial judge that the possibility of tampering was a less likely inference because "the duplicate contained *more* conversation than the

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[2] In his brief, Knox states that his counsel was ineffective for failing to conduct a proper and timely investigation related to the authenticity of the tape evidence at the pre-trial and trial states. As we have discussed, however, his counsel raised the issue of the tapes' authenticity, and Knox fails to identify any further steps his counsel should have taken to pursue a claim that the recordings were falsified.

[3] The recordings used as evidence were copies of duplicate originals made at the same time as the original recordings and intended to be identical to them. *See Boyd*, 208 F.3d at 642.

original." *Id.* (emphasis in original). It stated that "[a]lthough it is possible in principle that the government 'edited in' additional conversation to the duplicate, there is no indication at all of this more elaborate form of tampering." *Id.* The Seventh Circuit also credited the testimony of a government agent who "spot checked" the tapes for consistency, noting that "while it would have been preferable had the agent checked all the tapes, no reasons have been suggested for doubting either the good faith or the adequacy of his sampling." *Id.*

Under the law of the case doctrine, "'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.'" *U. S. v. Thomas*, 11 F.3d 732, 736 (7th Cir. 1993) (quoting *U.S. v. Feldman*, 825 F.2d 124, 130 (7th Cir. 1987). Though Knox's constitutional claim-that the government introduced false evidence against him in violation of his right to a fair trial-was not specifically raised and decided on appeal, his arguments concerning the integrity of the duplicate tape recordings, which form the basis of his current claim, were considered fully and rejected. There is no basis to revisit the matter in a § 2255 proceeding. For the same reason, Knox has failed to show a sufficient basis to invoke the discovery processes available under the Rules of Civil Procedure, and the Court therefore denies his request that the government produce the tapes for further analysis.

3. Claim 5 (Ineffective Assistance)

In claim five, Knox asserts that his counsel rendered constitutionally ineffective assistance. The claim is based in part on allegations that his counsel failed at trial or on appeal to raise the substantive claims we have addressed in issues 2, 3 and 4. For the reasons we have discussed, a hearing is required on issues 2 and 3 as well as on the ineffective assistance claim insofar as it involves the failure to raise those issues at trial and on appeal. The ineffective assistance claim regarding issue 4 (concerning the tape

recordings) is without merit, as the issue was sufficiently aired at trial and on appeal, and, as we have found, is not properly addressed in this proceeding.

Claim 5 is based on one additional ground which we now address. Knox alleges that he was deprived of effective assistance before the Seventh Circuit on remand from the Supreme Court in that his counsel failed to argue that application of the *Apprendi* rule to the facts of his case should result in lower sentences for his narcotics conspiracy and RICO convictions. He argues that the statement his counsel submitted following remand pursuant to Seventh Circuit Rule 54 was essentially a "motion for extension of time," that the court disregarded that filing, and that it adopted the government's unopposed position that his sentence should be affirmed, *Apprendi* error notwithstanding. Knox argues that his counsel should have filed a substantive Rule 54 statement giving Knox's views on the *Apprendi* Issue.

We do not agree with Knox that his counsel's performance was deficient. Seventh Circuit Rule 54 provides that "when the Supreme Court remands a case to this court for further proceedings, counsel for the parties shall... file statements of their positions as to the action which ought to be taken by this court on remand." As Knox concedes, his counsel complied with the rule, requesting that the court remand the case to the district court or set a briefing schedule allowing time for full briefing on the impact of *Apprendi*. The Seventh Circuit denied these requests, but that does not render his counsel's strategy objectively unreasonable. Moreover, Knox cannot make the required showing of prejudice. It is true that the court adopted the government's position and affirmed his sentence. But the Court sees no basis to believe that any amount of argument to the contrary would have changed the court's decision that the *Apprendi* error in Knox's case was "harmless ... beyond any possible doubt." *Green*, 6 Fed. Appx. at 377.

4. Claim 6

Claim 6 is an ineffective assistance claim based on counsel's failure to call at sentencing witnesses who would have testified that Knox withdrew from the racketeering and narcotics conspiracies prior to November 1987, when statutory changes took effect which increased the maximum penalties for those offenses from 20 years to life. Knox has submitted affidavits from Alan Knox and Jerry Robinson, two former El Rukns who state that they would have testified that Knox withdrew from the gang in the later part of 1986 or early part of 1987. Regardless of his counsel's reasons for declining to present these witnesses, Knox cannot make the required showing of prejudice. During his sentencing hearing, Knox raised the issue of withdrawal and presented the affidavits of two other El Rukn gang members, Earl Hawkins and Edgar Cooksey, along with a statement by Jeff Fort, the leader of the gang, all indicating that Knox had fallen out of favor with the gang's leadership prior to the time of the relevant change in the law. But the judge determined that although Knox had done things to upset the gang's leadership, his alienation from the El Rukns "[did] not fall within the classic definition of withdrawal," because he was still subject to the gang's authority. Sentencing Hearing Transcript at 8. Considering "the overall role that Knox played in the organization and his relationship with Fort and its other leaders," the court concluded that Knox was still part of the El Rukns "family" after 1987 and that "whenever the leaders wanted him back in, he was there at their beck and call" *Id.* at 8-9. Given the basis for the sentencing court's decision, the testimony of two additional El Rukns members who would have testified that Knox was "out of the [El Rukns] nation" would not have made an impact on the result of the proceeding.

Conclusion

For the foregoing reasons, the Court orders a hearing on claims 2 and 3 of Knox's section 2255 motion, as well as issue 5 to the extent it involves his prior counsel's failure to

raise the points covered in claims 2 and 3. The Court denies Knox's section 2255 motion with respect to claims 1,4, 6, and the remainder of claim 5 [docket # 1-1]. Knox's "motion to proceed with pending arguments" [docket #13-1] and his motion to correct typographical errors [docket # 18-1] are granted. His motion to stay [docket # 5-1] is denied. The Court appoints Kimball Anderson of Winston & Strawn to represent Knox pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A. The case is set for a status hearing on September 10, 2003 at 9:30 a.m. for the purpose of setting a hearing date.

/s/
MATTHEW F. KENNELLY
United States District Judge

Date: August 26, 2003